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WM. R. STANSBURY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 284.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(A CORPORATION), *Respondent.*

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

REPLY BRIEF FOR PETITIONER.

HUGH GORDON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SCOPE OF REVIEW.

The Supreme Court of California in annulling the order of the California Railroad Commission in the matter here under review based its decision exclu-

sively on one proposition. That was the proposition that the authority to require respondents to build a new union depot had been vested in the Interstate Commerce Commission by the Transportation Act of 1920 and by virtue of said Act the California Commission had been divested of jurisdiction over the subject (Tr., p. 233). Of the many other questions submitted to it, including questions of fact, reasonableness of the order, sufficiency of evidence, due process of law, et cetera, the California Court made no mention although the entire record was before it.

In filing the Petition for the writ of certiorari in this Court petitioners submitted but one issue. That was the one issue decided by the Supreme Court of California above set forth. Accompanying this Petition a greatly diminished transcript of record was filed containing only the pleadings, orders, and decisions in the case and omitting all testimony and exhibits. Upon the granting of the writ by this Court, it was the intention of petitioner to confine itself to this one issue and to have filed as the return to the writ the same transcript which was filed with the Petition. Respondents, however, declined to stipulate to the filing of this transcript alone and requested that enough evidence be included in the record to enable this Court to pass on all matters presented to the State Court although not passed upon by that Court. Accordingly, at the express request of respondents the supplemental transcript containing a considerable part of the testimony was prepared and certain exhibits filed. Respondents now argue in their brief that this transcript ought not be considered and that the review should be confined to the one issue presented by petitioner (Res. Br., pp. 12-18).

Petitioner has never believed that upon a writ of certiorari to a state court, this Court would pass upon questions not determined by the State Court and have never argued that this should be done. Since respondents have now arrived at the same conclusion there is no dispute between the parties as to the scope of this review.

However, the supplemental record has been filed and sufficient evidence is before the court, so that if the court should determine that both parties are wrong in their conception of the law on this point, a decision on all points can be rendered.

THE TRUE ISSUE.

The true issue in the case is the issue created by the holding of the California Court that the authority to require respondents to build a Union depot has been vested in the Interstate Commission by the Transportation Act of 1920 and the California Commission thus deprived of this power. To determine this issue it is necessary to determine precisely what the order of the California Commission requires and also to just what extent Congress has vested new authority in the Interstate Commission.

THE ORDER OF THE CALIFORNIA COMMISSION.

It is agreed by all parties that the order requires the Railroads to

Procure new grounds for a Union Depot;

File Plans and Specifications for a Depot;

Construct a depot in accordance with these plans, and

Eliminate grade crossings.

It is insisted by respondents that in addition to the above the order requires the Railroads to make extensions and abandonments of their lines and make joint use of each other facilities. With this contention petitioner does not agree.

As pointed out in our former briefs the exact requirements of the order are shown by the map. The Southern Pacific Lines from the north and east pass directly through the area designated by the Commission for the Depot. The Santa Fe line borders the area along the whole of its Eastern side and the Salt Lake line does likewise, but is separated only by the Los Angeles River, less than 200 yards wide. The Southern Pacific Lines from the South must reach the proposed depot site by shifting the Alameda Street line down to the area along the river bed or by arranging for a joint use of tracks with one of the other carriers, a plan which the Southern Pacific has itself proposed and strenuously argued for, but which the State Commission has not ordered and which it is not claimed this Commission has jurisdiction to order.

The alleged abandonment of lines refers solely to the cessation of main line traffic upon Alameda Street. This, of course, is the very essence of the plan to eliminate the grade crossings. The Southern Pacific has itself proposed to eliminate the Alameda Street crossings by a similar cessation of traffic on that Street.

The final order of the Commission (which is the only order the State Court considered, the first order having been entirely superseded) required only such additions to, extensions of, improvements and changes in the existing railroad facilities "*as may be reasonably necessary and incidental to the use of the Union Passenger Station*" (Tr., p. 146).

No joint use of trackage was ordered and it is clear from the map that each railroad can reach the proposed depot on its own tracks, if it so desires.

That such an incidental re-arrangement of trackage and construction of approaches to the depot, constitute "extensions" and "abandonments" within the meaning of the Transportaion Act, was, of course, never admitted or conceded by petitioners' counsel, but has been at all times strenuously denied.

Upon the assumption (which we claim is erroneous) that the Commission has ordered extensions and abandonments and joint use of facilities, as those terms are used in the Act of Congress, respondents have devoted a large part of their brief to proving by a wealth of authority that Congress having legislated in this field the State Powers have been superseded. Upon these general propositions there is no dispute. The true issue as above stated is whether or not Congress, in adopting the act of 1920 has in fact legislated upon the matters covered by the final order of the California Commission here under review. To this question, we say the answer must be no.

To sustain our position on this issue, we have only to refer to the particular terms of the Act of 1920. In that Act there are certain sections which deal with extensions and abandonments of lines, joint use of facilities and with terminals. But in legislating upon these particular matters just how far has Congress gone in enlarging the powers of the Interstate Commission? We are not concerned with how far Congress could have gone or what would have been the result if Congress had attempted to occupy the entire field of regulation.

THE ENLARGED SCOPE OF THE INTERSTATE COMMERCE ACT.

Counsel for respondents place much stress upon the greatly enlarged powers of the Interstate Commission under the 1920 Act. They point out that a new National Policy has been declared and quote the statement of this Court in the Wisconsin case, that "The Act made a new departure." With these general propositions we are in entire accord. But we do not think they are determinative of the issue here. Respondents' argument seems to be that because the act has made a new departure, therefore the power of the States on these particular matters has been superseded. But Congress has not vested such broad sweeping powers in the Interstate Commission as to "involve general regulation of intrastate commerce" (*Railroad Commission* v. *C. B. & Q.*, 257 U. S., 563, 590). In vesting new powers in the Interstate Commission, at least as to all matters of the kind here at issue, Congress has been specific and definite. It is the position of petitioners that as to these sections of the Act which deal with extensions, abandonments, and terminals, the extent to which Congress has increased the power of the Interstate Commission as to these matters must be determined by analysis of the particular sections. Undoubtedly a consideration of the Act in its entirety and of the enlarged scope of the powers of the Interstate Commission is a valuable aid in construing those powers expressly created. R. R. C. Wis. v. C., B. & Q. R. R. (*Supra*), Akron C. & Y. R. R. Co. v. U. S., 43 Sup. Ct. Rep., 270 But it is not proper by such a consideration of the enlarged scope of the Act to import into the statute powers not expressly conferred or necessarily implied by any of its

specific provisions. This we submit is the fallacy of respondents' argument.

EXTENSIONS AND ABANDONMENTS.

Paragraph 18 of Section 1 of the Act of Congress provides in part

> "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad or the construction of a new line of railroad or shall acquire or operate any line of railroad or extension thereof * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity will require the construction or operation * * * of such additional or extended line of railroad, and no carrier by railroad shall abandon all or any portion of a line of railroad, or the operation thereof unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The extensions referred to in this section are extensions constructed to render new service, i. e., service to a community or to persons who have either not been served at all or who are in need of additional service, and the abandonments refered to are abandonments of lines of railroad by which communities or persons are deprived of railroad service. Where a mere relocation of tracks is made, such as taking up one piece of a track and laying another in its stead a short distance away with no cessation or change of service, there is no extension or abandonment of a line of railroad within the meaning of the Act. The

Interstate Commerce Commission has so construed this section of the Act.

In application of *Philadelphia, Newton & N. Y. R. R.*, 67 I. C. C., 252, the Railroad Company asked for a certificate of public convenience and necessity to abandon a portion of its railroad in the city of Philadelphia and to construct a new line to take the place of the abandoned portion. The Commission said:

> The purpose of the proposed change is to permit the construction of a building at the corner of Second Street and Erie Avenue, and to enable the city of Philadelphia to vacate American Street betwen Erie Avenue and Pike Street, as well as Butler Street between Second Street and American Street. * * * So far as service to the public is concerned, the proposed change will have no effect whatever, the public being interested only to the extent that travel on the public streets will be facilitated by the readjustment.
>
> From the facts above stated, it is evident that the removal of the present tracks between Pike Street and Erie Avenue can not be said to constitute an abandonment of a line of railroad within the meaning of paragraph (18) of Section 1 of the Interstate Comerce Act, since the applicant's whole line will still be in service as before and will render exactly the same service in a new location. Nor do we think that the relocation of the line constitutes the construction of a new line of railroad or an extension of a line of railroad within the meaning of that paragraph. The project is purely a relocation of an existing line under circumstances involving no change in the service rendered by the applicant to the public.

To the same effect see application of Pearl River Valley R. R. Co., 67 I. C. C., 748.

It has been held by this court that if the meaning of a statute is doubtful, the decision of an administrative board charged with its execution is entitled to great weight.

Pennoyer v. *McConnaughy*, 140 U. S., 1, 24, 25.
New York, N. H. & H. R. Co. v. *Interstate Commerce Commission*, 200 U. S., 361.
T. & T. Ry. Co. v *Abilene*, 204 U. S., 426, 433.

On pages 56 and 57 of their brief respondents have cited seven decisions of the Interstate Commerce Commission as holding that that Commission has placed a practical construction upon paragraph 18 of Section 1 and "has asserted and exercised jurisdiction over these matters," referring to changes of trackage such as were ordered here.

We must respectfully protest that respondents' citations do not suport their text.

Examination of these cases shows that every one of them is in full harmony with the Interstate Commerce Commission's decision in the *Philadelphia, Newton & New York case* above quoted and fully supports the construction of paragraph 18, Section 1, for which we are contending.

For example, in the *Virginia Western Extension Case*, 72 I. C. C., 55 (cited in respondents' brief, page 57), the extension for which a certificate was sought was 3.6 miles in length and was to serve a territory *not served by any railroad*. The primary purpose of the extension was to develop 5000 acres of coal land.

In the *Chicago & Alton Railroad Extension Case*, 72 I. C. C., 1 (cited in respondents' brief, page 57), the proposed extension was 5.67 miles of new line. It was to serve new territory in which was a town of 694 peo-

ple *not served by any railroad.* It was also to furnish transportation for large apple and timber industries.

In the *Silverton Railway Abandonment Case*, 72 I. C. C., 13 (cited in respondents' brief, page 57), 15 miles of line was sought to be abandoned. This line was built to serve a mining territory and the mines had become practically exhausted. Abandoning the line left the territory without railroad service at all.

We are in full agreement that cases such as those cited by respondent come within the provisions of paragraph 18, section 1, and call for a certificate of public convenience and necessity.

But in the case at bar we have a rearrangement or relocation of tracks such as falls squarely within the decision of the Interstate Commerce Commission in the *Philadelphia, Newton & New York case, supra,* where it was said "the applicant's line will still be in service as before, and will render exactly the same service in a new location."

From the above construction it follows that in adopting paragraph 18, section 1, Congress has not occupied the field covered by the State Commission's order so far as any alleged extensions or abandonments or changes in trackage are concerned, and the order of the Commission as to these matters is within its power.

TERMINALS.

Paragraph 4, section 3, deals with terminals. In adopting this paragraph has Congress gone to the extent of depriving the States of all power to require carriers to construct new depots? Only a careful examination of this particular paragraph can answer this question. Such analysis was made on pages 24 to 26 of petitioner's first brief and it need not be re-

peated here. It is apparent from the section that Congress was dealing only with the use by one carrier of the existing terminal facilities of another. There is nothing in the section which refers to the acquisition of new property or the construction jointly of a new Union Depot on a new site. That Congress ought to have included the construction of new depots and the acquisition of new property, or that confusion may result because Congress did not see fit to do so is a matter for that body to consider and is beside the point here. And to attempt by implication to extend the language of paragraph 4 beyond its plain terms is clearly unwaranted. As said by this court in the Minnesota Rate cases:

> "The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. * * * The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.
>
> "But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. * * * Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power" 230 U. S., 351, 432, 433.

But, if there is any doubt that the terms of paragraph 4 cover only the use of existing terminal facilities and do not go to the acquisition of new property and the construction of new depots, it is only necessary to refer to the legislative history of the act, which shows that an amendment which would have given the Interstate Commission the very power now claimed for it by respondents, was voted down and that Chairman Esch of the Committee having the bill in charge stated that the matter was to be left within the jurisdiction of the State Commissions (Pet. 1st Br., pp. 30 to 32).

That this court will in proper cases refer to committee reports and statements of the chairman of a committee having a bill in charge, was held in the *Shreveport case*, 234 U. S., 342, 356, and also in *Akron, C. & Y. Ry. Co.* v. *United States*, 43 Supreme Court Reporter, 270, 274. In the latter case statements of Chairman Esch relative to the Act here being considered were cited by the court.

As already pointed out and as reference to the map clearly shows, it is not necessary, in order to carry out the Commision's order for the cariers to do more than merely rearrange their tracks. There will be no extensions, no abandonments, no joint use of tracks or "physical connections" (unless they themselves desire it), no interchange of traffic, no use by one carrier of the terminal facilities of another. It follows that the order of the Commission can be carried out without infringing in any particular upon the enlarged power of the Interstate Commission.

This being so, it is unnecessary to consider the arguments of respondents relative to the undisputed power of Congress to legislate on the subject of interstate commerce.

"It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Ex parte McNiel, 13 Wall. 236, 240, 20 L. ed. 624, 625; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Mobile County v. Kimball, 102 U. S., 691, 697, 26 L. ed. 238, 239; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 481, 485, 31 L. ed. 700, 705, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 103, 104, 39 L. ed. 912, 913, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140."

Minnesota Rate Cases, 230 U. S., 351, 399, 400.

"Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of the people, although interstate commerce may incidentally or indirectly be involved."

Id., p. 402.

STATE COMMISSION'S ORDER DOES NOT SUPPLEMENT FEDERAL REQUIREMENTS.

Two other matters require some discussion. In petitioner's brief in support of the petition (p. 29) it was suggested that if it were necessary to issue securities to carry out the Commission's order, application therefor could be made by the carriers to the Interstate Commission for permission. Respondents claim that by this suggestion petitioners are proposing that the states "supplement" the requirements of the Federal statutes, and cite many cases to show that such concurrent jurisdiction is not recognized. Again we agree with respondents' argument upon the fundamental proposition. The state can no more supplement the requirements of a Federal statute, than it can annul them. But this was not what petitioners suggested.

If, in order to comply with a lawful state order, the railroads find it desirable to issue securities, or if in order to reach the proposed depot, respondents prefer to use certain trackage jointly, rather than to come in, each over its own tracks, then respondents can ask the Interstate Commission for permission to do these things. But these things are not ordered by the State Commission. The Commission's order stands alone and does not supplement any Federal requirements, or necessarily involve the exercise of any concurrent jurisdiction, but simply directs certain things to be done, all of which are exclusively in the power of the State to require and not prohibited by any provisions of the Act of 1920.

The possibility that the Interstate Commission may be called upon to grant permission to the railroads to do certain things to facilitate compliance with the State

Commission's order is not an attempt by the State Commission to supplement the requirements of a Federal statute. On the contrary, it would be calling upon the Federal body to supplement the requirements of a state commission's order and would be entirely in harmony with the spirit and meaning of the Interstate Commerce Act. Sec. 13, Par. 3.

PROVISO OF PARAGRAPH 17, SECTION 1.

There has been considerable discussion in the briefs as to the effect of the proviso at the close of paragraph 17, section 1, which in plain terms says that nothing in the Act shall impair the right of a State in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Interstate Commission made under the provisions of the Act.

We have already stated our contention that the Act does not impair the power of the State to make the order which the California Commission made. It is also clear that the Act has in no way deprived the States of their power over intrastate commerce or vested the Interstate Commission with any power of "general regulation of intrastate commerce." *Railroad Commission of Wisconsin* v. *C. B. & Q. Ry.*, 257 U. S. 563, 590. And, of course, regardless of this proviso Congress could not and has not endeavored to encroach upon the constitutional powers of the States reserved to them by the 10th Amendment to the Constitution.

The purpose of the proviso was undoubtedly to declare what was said by Congressman Esch, that the Act had not, and should not be construed as having

deprived the States of matters lying within their police power including the matter of depots. To this extent we agree with respondents that the proviso did no more than declare what is apparent from reading the Act and what is existing law regardless of the proviso.

But the proviso also says that the State's requirement shall not be impaired except when "such requirement is inconsistent with a *lawful order* of the (Interstate) Commission." (Italics ours.)

This portion of the proviso is an apparent recognition of certain well established principles.

The power of Congress to regulate interstate commerce is supreme and exclusive, but remains dormant until actually exercised. The power to regulate intrastate commerce is left exclusively in the States and in the exercise of that power the State may, so long as the Federal power remains dormant, indirectly affect interstate commerce. As soon as the Federal power is exercised, then all State regulations which conflict with it, even though intended to operate exclusively on intrastate commerce, must yield to the paramount power of the Nation.

In the case at bar, as we have shown, Congress has not vested powers in the Interstate Commission which give it authority over the matters contained in the California Commission's order. The Federal power as to these matters remains dormant. But Congress has given the Interstate Commission vastly enlarged powers. If in the exercise of these powers the Interstate Commission should make a "*lawful order*" affecting interstate commerce and that order conflicted with any requirement made by a State in the exercise of its police power to require reasonable intrastate service, such "lawful order" of the Federal Commis-

sion would be paramount to the State requirement. To quote again from the Minnesota State case:

> "Within the State power, then, in the words of Chief Justice Marshall, is 'that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. * * * If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.' Gibbons v. Ogden, 9 Wheat. 203, 204, 6 L. Ed. 71, 72.
>
> "And whenever, as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority." 230 U. S. 351, 411, 412.

The order of the California Commission is made under the police power of the States to require good service for intrastate business. The fact that it may indirectly affect interstate commerce is of no consequence so long as the Interstate Commission in the exercise of its powers over interstate commerce makes no lawful order that stands in the way of the State's requirements. The Interstate Commission has made no such order in this case.

Respondents in their brief have attempted to show that the Interstate Commission has "actually taken action" by referring to the fact that the city of Los Angeles filed a petition with the Interstate Commission

invoking its powers to order the same relief that was granted by the order of the California Commission and that hearings have been had on that complaint. Respondents omitted to state that at the conclusion of this hearing Commissioner Aitchison said:

> Commissioner Aitchison: By stipulation the Commission will depart from its usual rule as to fixation of time for filing of briefs, and will give the matter consideration after the *certiorari* case of the Supreme Court has been disposed of, and the case will rest in abeyance until then. Is that satisfactory to all concerned?

To this proposal counsel for respondents agreed and the hearings adjourned.

It thus appears that instead of having "actually taken action" the Interstate Commission has expressly declined to take action and will make no "lawful order" either consistent or inconsistent with the order of the California Commission until after this court has rendered its decision in the case at bar.

In the absence of any inconsistent order by the Interstate Commission we submit that the validity of the order of the California Commission is fully preserved by the proviso of paragraph 17, section 1.

On the construction of this proviso we respectfully direct the court's attention to the case of *Chicago, R. I. & P. Co. ex Stats*, 217 Pac. 147. In this case the Oklahoma Supreme Court sustained an order of the Oklahoma Corporation Commission which was almost identical with the order of the California Commission here under review. A union station was ordered at a new site, grade crossings were ordered eliminated and the carriers were ordered to file plans and specifications. All the objections that are being made here

were presented to the Oklahoma court and the court held in no uncertain terms that the Act of 1920, had not taken away the state's power to make such an order. It was held that the proviso of paragraph 17, section 1, covered depot facilities and fully preserved the state's power over them.

As to the contention which is made so insistently here that the order placed an unlawful burden on interstate commerce, the court said:

> "The question of whether the construction of this depot will place an unusual burden on the company, so as to cripple its operation upon interstate or foreign commerce, cannot be determined until after plans and specifications are made and approved and the distribution of the costs made."

The situation is identical with that presented by the case at bar. Plans have not yet been filed by the carriers as required by the California Commission's order and it is impossible for any one to say whether the cost of complying with that order will place an unusual burden upon the carriers.

Finally, we desire to point out that the absence of any "lawful order" of the Interstate Commission which is inconsistent with the requirements of the State's order is one of the important points which distinguish this case from the *Wisconsin Rate Case* and the *Shreveport Case*.

In the *Wisconsin Rate Case* "The Interstate Commission *had found* there was an undue, unreasonable, and unjust discrimination in Wisconsin against interstate passengers and against interstae commerce as a whole." The same condition existed in the *Shreveport Case*. In both cases the rates fixed by the State

had been found by the Federal Commission to constitute an unlawful burden on interstate commerce.

No such condition exists here. The Interstate Commission has made no such finding. The case, therefore, falls within the rule of the *Minnesota Rate Cases*, i.e., that the order of the State is valid in the absence of contrary action by the Federal power. This rule was reaffirmed by this Court in the Shreveport case in the following terms:

> "Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the States, or of the agencies created by the States. This was the question recently decided by this court in the Minnesota Rate Cases."

Quoting from the latter case this Court said:

> "* * * The question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the courts." 234 U. S. 341, 357, 358.

We respectfully submit that the decision of the California Supreme Court annulling the order of the California Railroad Commission was erroneous and should be reversed.

Respectfully submitted,

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